THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner for the Appellate Panel

W.C.C. File Number 0922072

Appellate Case No. 2013-001324

Roger Dale Kelley, ... Deceased, Employee, Claimant,

v.

The Kroger Company, ... Employer, [redacted], Respondent

The Kroger Co. c/o Sedgwick CMS, ... Carrier, [redacted], Respondent

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REPLY BRIEF OF APPELLANT

October 22, 2013

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ARGUMENT

Standard of Review

Appellee, in its opening brief, states that the standard of review is "clearly erroneous" in view of the substantial evidence. However, section 1-23-380 of the South Carolina Code provides that the "clearly erroneous" standard is ***only*** for ***issues of fact.*** S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Systems Intern., 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009) (citing S.C. Code Ann. §1-23-380). For issues of fact "[t]he test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78-79 (Ct. App. 1995). The standard of review cited by appellee is only part of the standard. For issues of law, the standard of review is de novo. Section 1-23-380(5)(d) provides that a decision of the agency may be reversed if it is "affected by other error of law." S.C. Code Ann. § 1-23-380(5)(d) (Supp. 2012). Despite the significant deference that the substantial evidence standard affords the Commission as to the weight of the evidence on questions of fact, "[w]here there are no disputed facts,

the question of whether an accident is compensable is a question of law." Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007); see also Langdale v. Harris Carpets, 395 S.C. 194, 200-01, 717 S.E.2d 80, 83 (Ct. App. 2011) (stating a reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse a decision affected by an error of law).

I. Roger's Kelley's Death Arose Out of Unusual And Extraordinary Conditions of Employment.

In its brief, Appellee focuses much of its attention on its claim that Roger Kelley's injury and death did not arise out of an "unusual and extraordinary condition of employment." However, Appellee's argument only highlights the need for this court to accept review and determine what an "unusual and extraordinary condition of employment" is in relation to heat and atmospheric induced injuries and heart attacks.

On page 15 of Appellee's Brief, Appellee states ***in support of its position***: "Compare Finding of Fact 6 (which Claimant conveniently omits): "The greater weight of the evidence shows that Decedent's working condition were not excessive, and the temperature of the working area was less than 90 degrees," with Finding of Fact 11: "there is no evidence that Decedent was required to perform tasks out of the normal for his job description." Initial Brief of Appellee at 15, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (August 26, 2013). From this, Appellee makes the bald assumption that the Commission applied the correct standard. The two findings, however, taken together, make it clear that the Full Commission's entire focus was on comparing Roger Kelley to others with the ***same job description*** in determining what was "unusual and

extraordinary." Otherwise, it would have mentioned the different standard and stated the outside temperature of the "general public" in its findings of fact. There is no other reasonable conclusion.

It is clear that the Commission based its comparison on others with the ***same job description***. However, that is not the proper comparison ***in cases involving heat***. The proper comparison in determining whether there is an ***unusual and extraordinary*** condition of employment is the comparison between the employee's conditions and the conditions of the ***general public or the public at large***. The majority of courts have found workers' compensation coverage of an employee's injury or death from exposure to excess or extreme heat. 82 Am Jur 2d, Workers' Compensation, Sec. 263. Exposure to excessive heat subjects the employee to an increased risk of injury or death, that is, a risk greater than that which the general public is exposed. Generally, the courts find heart attacks and other injuries resulting from exposure to extreme heat, heat stroke, heat prostration, heat exhaustion, or sunstroke occurring in the course of an employment is work related injuries. These holdings are based on the theory that heat related injuries are not the natural, probable, and predictable result of exposure to the prevailing conditions but constitutes an extraordinary and unlooked-for mishap. 99 Corpus Jur 2d, Workers' Compensation, Sec. 388; see also Floyd v. W.O. Greene Plumbing and Heating Company, 255 S.C. 352, 179 S.E.2d 28 (1971) (court found the employee's death work related and arising out of employment when the employee was found dead of a heart attack while working on a hot day doing heavy exertion); and Fidelity and Casualty Co. v. Adams, 28 S.E.2d 79 (1943) (death following heat stroke after labor in mining kaolin).

This is the "exception" to the heart attack rule created by Holley v. Owens Corning Fiberglass Corp., 301 S.C. 519, 392 S.E.2d 594 (Ct. App. 1990). In ordinary "heart attack" cases, the determination of "unusual and extraordinary" conditions is based on a comparison between the injured employee and others with the ***same job description***. See Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). In ***heat induced*** "heart attack" cases, in contrast, the comparison is between the employee and members of the general public or the ***public at large.*** The Full Commission clearly referenced those with Roger Kelley's ***job description***, not the general public, in its findings and thereby applied the wrong legal standard. As the court noted in Nicholson v. South Carolina Department of Social Services, Appellate Case No. 2012-206507 (filed September 4, 2013):

> "'An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.'". . .
> However, an injury is excluded from compensability under the Workers' Compensation Act when it "comes from a hazard to which the workmen would have been equally exposed apart from the employment." . . . Therefore, a claimant's injury is only compensable if the source of the injury was a risk "peculiar to the work and not common to the neighborhood."
>
> For an injury to arise out of employment, "a causal connection must exist between the conditions under which the work is required to be performed and the resulting injury." . . . But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood.

This is the standard that has been adopted by South Carolina. In Sturkie v. Ballenger Corporation, 268 S.C. 536, 235 S.E.2d 120 (1977) the Court stated: "the test 'as to whether the injury or death arose out of or in the course of employment when caused or hastened by atmospheric conditions, is whether, under all circumstances, the employee was exposed to a greater risk by reason of his employment and duties than was imposed upon ***an ordinary member of the public***.'" Id. at 541-42, 235 S.E.2d at 122-23 (emphasis added); see also Heirs v. Brunson Construction Co., 221 S.C. 212, 230, 70 S.E.2d 211, 219 (1952) (drawing comparison to ***"ordinary member of the public."***); see also Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) (where a special condition, circumstance, or hazard of employment must cause or contribute to the employee's accident and create a hazard which would not be encountered by the general public); and Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) (the court recognized that a special condition or hazard can be used as a basis for establishing causation when it is a risk associated with the employment and this risk caused or contributed to the employee's injuries).

This is the same standard adopted in other states. Contrary to Appellee's statements, the cases from other states do involve heart attacks. See Reaves v. Industrial Pump Service, 671 S.E.2d 14, 20 (N.C. Ct. App 2009) (In a case involving heat induced heart attack, "the test ... focuses on whether the hazardous conditions to which the employee was exposed are greater than those conditions encountered ***by the general public.***") (emphasis added); see also Southern Express v. Green, 509 S.E.2d 836 (Va. 1999) (***quoting*** Byrd v. Stonega Coke and Coal Co., 28 S.E.2d 725 (Va. 1943), a case

involving a heat induced heart attack, and stating that comparison is between worker and "public at large.")

Appellee, in its Initial Brief, tries to draw a number of ***factual*** distinctions between this heat induced heart attack cases and Roger Kelley's case. Initial Brief of Appellee at 17-18. The Appellant contends that the facts of Roger Kelley's death are not as extreme as those of the other heart attack cases.

This is a red herring. First, the ***facts*** of the cases are irrelevant to the issue of whether the correct ***legal standard*** was applied by the court. Second, even if the facts were to be considered, this case clearly lies much closer to the heat induced heart attack cases than Appelle would like to admit. The Appellee notes its discussion of Dillingham, a North Carolina case cited by the South Carolina case of Holley v. Owens Corning Fiberglass Corp., 301 S.C. 519, 392 S.E.2d 594 (Ct. App. 1990), that there was a history of heat induced heart attacks. Initial Brief of Appellee at 18. There is a history of heat induced problems at the Kroger Bakery. Claimant APA at 257:1-259:19, Padget Dep. at 14:1-16:19, June 27, 2012. Further, in Madison v. International Paper Co., 598 S.E.2d 196 (N.C. Ct. App. 2004), the temperature decedent was exposed to, with the doors of the dryer closed, was in excess of 90 degrees. In Roger Kelley's case the temperature was 86-88 degrees. Roger Kelley's employment subjected him to an increased risk for a heart attack, that is, a risk greater than that to which the general public was exposed. Moreover, Roger Kelley's employment was physically strenuous as he loaded heavy bread trays into a hot bakery in an hot work environment with temperatures of 86-88 degrees. The examining pathologist, Dr. Woodward, clearly established a contributing cause and a substantial causal relationship between Roger Kelley's employment and his death.

Claimant APA at 1. There was also humidity in play, similar to Sturkie. This is clearly a case falling within the heat induced heart attack rule.

The Full Commission clearly applied the wrong ***legal*** standard. This Court should review this case ***de novo***, find that there was an error of law, and reverse the Full Commission.

II. Dr. Woodard Stated His Opinions To A Reasonable Degree of Medical Certainty Sufficient To Support a Claim Under Section 42-1-172 And Clearly Provided Evidence Sufficient To Support A Claim Under Section 42-1-160.

A claim for repetitive trauma requires proof by medical evidence "to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172(C) (Supp. 2012). In contrast, where repetitive trauma is not alleged and "the testimony of medical experts is relied upon to establish a causal connection between an accident and subsequent disability, the opinion must be at least that the disability "most probably" resulted from the accidental injury." Sharpe v. Case Produce Co., 329 S.C. 534, 546, 495 S.E.2d 790, 796 (Ct. App. 1997). The phrase "more likely than not" has been held to met this standard. Springs Industries v. South Carolina Second Injury Fund, 296 S.C. 359, 362-63, 372 S.E.2d 915, 917 (Ct. App. 1988). Likewise, the phrase "very likely probability," when combined with other testimony, has been held to satisfy the standard. Id. (citing Cline v. Nosrenda Corporation, Inc., 291 S.C. 75, 352 S.E.2d 291 (Ct. App. 1986)).

In this case, whether proof has been provided to a reasonable degree of medical certainty is dependent upon the standard imposed by Full Commission. The Full Commission erroneously compared the heat Roger Kelley was subjected to at work to

other employees ***with the same job description***. Under this erroneous standard, the Full Commission might erroneously conclude that there was "**NO EVIDENCE** that [Roger Kelley's] heart condition was aggravated by his work environment or job requirement." Appellate Panel Decision and Order at 14, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). Such a conclusion is not possible if the heat of Roger Kelley's work environment is compared to the heat that the general public is subjected.

Further, the Full Commission applied the standard of proof of section 42-1-172 to Roger Kelley's claim under 42-1-160. Section 42-1-172 requires proof of medical causation "to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172(C) (Supp. 2012). This standard does not apply in heat and atmospheric induced injuries. Dr. Woodard's testimony clearly met the "most probably" standard applicable to cases not involving repetitive trauma.

Both of these issues aside, Appellee's argument is fatally flawed. Appellee tries to draw a distinction between heat and humidity and alludes to the fact that Appellant did not submit any evidence of the humidity on the date Roger Kelley died. However, Dr. Woodard testified to his knowledge of humidity "typical" of Anderson, South Carolina at that time of year. Claimant APA at 69:25 – 70:24; Woodard Dep. at 63:25 – 64:24. The Appellee has cited no case stating that humidity cannot be established by circumstantial evidence. The Appellee has likewise not cited any case stating that it is the employee's responsibility to take constant heat and humidity measurements within his place of employment. Such an impossible standard would mean that employees could never recover under Workers' Compensation.

And fortunately, such is not the law of South Carolina. The Sturkie case involved heat, fog, humidity and dust resulting in a heart and respiratory condition. There is no reference to precise temperature or humidity measurements in the case. Humidity, heat and fog were apparently established by circumstantial evidence, which is all the evidence most employees will ever have. The Appellee's position is meritless. Appellee wishes to impose an impossible burden of proof upon all claimants.

Also, the Appellee makes much ado of the fact that the temperature in Roll Oven Area, where Roger Kelley worked, was measured at 86 degrees instead of 88 degrees on May 1, 2012, three years and a month after Roger Kelley's death. Defense APA at 181-82. This reading was taken after the peak Easter Season in which Roger Kelley died. Transcript of Proceeding Before Single Commissioner at 41:18-42:6, 44:15-19, 46:17-20; Claimant APA at 260:5-11, 275:1-4; Padget Dep. at 17:5-11, 32:1-4. Based on this two degree differential, the Appellee has labeled Dr. Woodard's conclusion speculative and unsupported. However, the Appellee can cite no case stating that a two degree temperature differential renders an expert opinion speculative. It is a ridiculous argument.

Further, the Appellee's argument in Part II.B of its brief is based entirely on its earlier argument on "unusual and extraordinary" conditions in Part I of its brief. An "unusual and extraordinary" condition of employment in cases involving heat and other atmospheric is determined by drawing a comparison between the employee and people in the population at large, not other employees with the same "job description." The Appellee's argument is as meritless in Section II.B of its brief as it was in Section I. This Court should review this purely legal argument *de novo* and reject it.

III. The Issue Of Repetitive Trauma Injury Under Section 42-1-172 Of The South Carolina Code Was Preserved For Appeal.

Under the Administrative Procedures Act, "an issue not raised in the application for review is not preserved for the full commission's consideration.... General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue.... However, rules of appellate procedure should not be interpreted to create a trap for the unwary." Clark v. Aiken County Government, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (2005) (finding "although we find preservation tenuous at best, we nevertheless proceed to the merits.")

"A party need not use the exact name of a legal doctrine in order to preserve it. Estate of Patterson v. The Palmetto Bank, 374 S.C. 116, 121, 646 S.E.2d 885, 888 (2007). An issue must both be raised before the trial court and ruled on by the trial court to be considered on appeal. Altman v. Griffith, 372 S.C. 388, 396, 642 S.E.2d 619, 623 (2007); Talley v. South Carolina Higher Education Tuition Grants Committee, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986). Compare Shelton v. LS&K, Inc., 374 S.C. 294 648 S.E.2d 307 (2007); Gurganious v. City of Beaufort, 317 S.C. 481, 454 S.E.2d 912 (1995) (cannot try case under one theory and appeal case under another).

Furthermore, it is not necessary for the Commission to cite section 42-1-172 to rule on the issue of whether there is a repetitive trauma injury. Substantial compliance is sufficient. In Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (2011), for example, the court stated: "We agree that the compensability of a repetitive trauma injury must be determined by the Commission under the provisions of 42-1-172. We find

the Commission thus erred by failing to address 42-1-172. Despite the Commission's error, we affirm as modified because although it cited 42-1-160, the Commission made the findings required under 42-1-172. See Dykes v. Daniel Constr. Co., 262 S.C. 98,109, 202 S.E.2d 646, 652 (1974) (concluding that although the Commission failed to make the specific finding in the statutory language, its substantial compliance implied such a finding, enabling the court to properly review whether there was evidence to sustain the award)." Id. at 84-85, 202 S.E.2d at 458.

In this case, the Appellee claims that Roger Kelley's estate failed to preserve an appeal under section 42-1-172 because it failed to state "42-1-172" in Form 30. Initial Brief of Appellee at 30. It correctly notes, however, that a claim under section 42-1-172 was mentioned in Form 58 filed before the Court. Initial Brief of Appellee at 29. It claims that this is insufficient to preserve the issue for appeal.

In order to preserve and issue for appeal, the issue must be ***presented*** to the Commission and ***ruled on*** by the Commission. Both took place in this case. Facts on a repetitive heat trauma were ***presented*** to the Full Commission. There was evidence that during the summer months, temperatures in the area where Roger Kelley worked could reach in excess of 100 degrees. Transcript of Proceedings Before Single Commissioner at 42:25- 43:6. A former sanitation worker said that workers in Mr. Kelley's area would often be wringing wet with sweat. One worker would wring sweat out her shirt and bring an extra one to work. Claimant APA at 263:8-20, Padget Dep. at 20:8-20, June 27, 2012. The Appellee failed to monitor inside temperatures, but temperatures taken three years later on May 2012 indicated an average temperature of 86-88 degrees in the area where

Roger Kelley worked. Defense APA at 181-82. There was evidence of repetitive excessive heat before, during and after the death of Roger Kelley.

Further, the medical evidence was presented to a ***reasonable degree of medical certainty***. As noted in Appellant's Initial Brief, section 42-1-172(B) of the South Carolina Code states: "An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence ..." S.C. Code Ann. § 42-1-172(B) (Supp. 2012). "Medical evidence," under section 42-1-172 means "means expert opinion or testimony stated ***to a reasonable degree of medical certainty.***" S.C. Code Ann. § 42-1-172(C) (Supp. 2012). Medical evidence "to a reasonable degree of medical certainty," is specifically required under the repetitive trauma statute.[1]

It is clear that medical evidence was presented to a "reasonable degree of medical certainty." Dr. Woodard testified that the ***inside*** temperature where Roger Kelley Worked, when combined with the humidity typical of that time of year would be a contributing factor ***to a reasonable degree of medical certainty.*** Claimant APA at 69:25 – 70:24; Woodard Dep. at 63:25 – 64:24. Later on in his Deposition, Dr. Woodard ***for a second time*** testified ***to a reasonable degree of medical certainty,*** that the temperature of 86 degrees in the area where he worked along with his heavy and strenuous working

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1 In contrast, where repetitive trauma is not alleged and "the testimony of medical experts is relied upon to establish a causal connection between an accident and subsequent disability, the opinion must be at least that the disability 'most probably' resulted from the accidental injury." Sharpe v. Case Produce Co., 329 S.C. 534, 546, 495 S.E.2d 790, 796 (Ct. App. 1997). The phrase "more likely than not" has been held to met this standard. Springs Industries v. South Carolina Second Injury Fund, 296 S.C. 359, 362-63, 372 S.E.2d 915, 917 (Ct. App. 1988). Likewise, the phrase "very likely probability," when combined with other testimony, has been held to satisfy the standard. Id. (citing Cline v. Nosrenda Corporation, Inc., 291 S.C. 75, 352 S.E.2d 291 (Ct. App. 1986)).

conditions were contributing factors in his myocardial infarction and that if he had been in an air conditioned office, "he probably wouldn't have died." Claimant APA at 76:23 – 77:19; Woodard Dep. at 70:23 – 71:19. Still later in his deposition, ***for a third time***, Dr. Woodard testified, ***to a reasonable degree of medical certainty***, that the heat of 86 degrees would "aggravate" his pre-existing heart condition and "contribute" to his death. Claimant APA at 79:9 – 80:4; Woodard Dep. at 73:9 – 74:4.

It is clear that evidence of repetitive heat trauma was presented to the Full Commission. It is clear that medical evidence was presented to a "reasonable degree of medical certainty" as required by section 42-1-172. And it is clear that the Full Commission ***ruled on*** the claim under section 42-1-172. The Court found that there was **NO EVIDENCE** in the record that his heart condition was aggravated by his work environment or job requirement." Appellate Panel Decision and Order at 13, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). There was clearly evidence in the record that Mr. Kelley's heart condition was aggravated by the heat. The only way the Court could have concluded there was **NO EVIDENCE** is by erroneously finding that there was no evidence "to a reasonable degree of medical certainty" as required by section 42-1-172.

This is clearly "substantial compliance" under Murphy. The Full Commission received evidence of repetitive heat trauma, required proof to a reasonable degree of medical certainty and ruled on the claim under 42-1-172, even if it did not specifically cite section 42-1-172. Given that the Full Commission considered evidence and ruled on the issue of a claim under 42-1-172, Appellee was clearly on notice of the claim and the issue was preserved for appeal. This case clearly falls under Clark and this Court should

find that the appeal under section 42-1-172 has been preserved, even though the specific section number was not named in Form 30.

Conclusion

For the reasons stated above, the Appellant respectfully requests that this Court reverse the Full Commission and remand this case for further proceedings with the proper legal standard to apply.

October 22, 2013

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